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# In the Supreme Court of the United States

OCTOBER TERM, 1934

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No. ——

THOMAS W. WHITE, FORMER COLLECTOR OF INTERNAL REVENUE, petitioner

*v.*

MARY ADELAIDE POOR ET AL., SURVIVING EXECUTORS

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT**

The Solicitor General, on behalf of Thomas W. White, former Collector of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the First Circuit entered in the above cause on January 31, 1935, affirming a judgment of the District Court.

**OPINIONS BELOW**

The opinion of the District Court (R. 43) is reported in 8 F. Supp. 995. The opinion of the Circuit Court of Appeals is reported in 75 F. (2d) 35.

## JURISDICTION

The judgment of the Circuit Court of Appeals for the First Circuit was entered on January 31, 1935. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

The decedent transferred certain property to herself, her son, and a third person, as trustees, to pay one-half of the income to the decedent during her lifetime and the other half to her three children until her death, with certain remainders over. The trust instrument provided that the trust might be terminated at any time by the trustees, such termination to be evidenced by written declaration signed, sealed, and acknowledged by them. The questions presented are:

1. Whether the property transferred in trust under such circumstances by the decedent should be included in her gross estate within the meaning of Section 302 (d) of the Revenue Act of 1926 because the enjoyment of the property was subject at the date of her death to change through the exercise of a power by the decedent in conjunction with other persons, to alter, amend, or revoke.

2. Whether Section 302 (d), as applied to the facts of this case, violates the Fifth Amendment to the Constitution.

## STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> (d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke * * *. (U. S. C. App., Title 26, Sec. 1094.)

## STATEMENT

The facts as stipulated by the parties (R. 8–33) and as found by the District Court (R. 43–45) may be summarized as follows:

In 1919 the decedent conveyed certain property to herself, her son, and a third person, as trustees, to pay one-half of the income to the decedent during her lifetime and the other half to her three children until her death, and thereafter all the income to go to the children, and upon the death of the last survivor of the decedent and the three children the trust was to terminate and the corpus to be distributed to certain specified beneficiaries (R. 12–15).

The trust instrument provided in part as follows (R. 18):

> Eighth. This trust may be terminated at any time either as to the whole or as to any part of the property held in trust hereunder, by the person or persons who shall then be trustees hereunder, such termination to be evidenced by a written declaration signed, sealed, and acknowledged by them and duly recorded in the Registry of Deeds for the County of Suffolk, setting forth specifically the property as to which such termination is to take effect, and in that event the trusts declared hereunder shall as to such property be at an end and such property shall be paid over and conveyed, free and discharged of all trusts, to the said Adelaide J. Sargent, if she be then living, and if she be not then living one share shall be paid over and conveyed to each of her children who shall then be living, and a like share shall be paid over and conveyed to the appointees by will of each of her children who shall then have died making such appointment, or failing such appointment, to the issue of such deceased child then living, such issue taking by right of representation.

The trust agreement also provided as follows (R. 16):

> In case of the absence from the United States of any trustee hereunder the other two trustees may exercise all the powers herein given to the trustees and perform all

> their duties, and the trustee so absent shall not be liable for the acts or omissions of his cotrustees during the period of such absence or for any losses arising therefrom, and the certificate of the other two trustees as to such absence, when signed, sealed, and acknowledged by him or them and duly recorded in the Registry of Deeds for Suffolk County, shall be conclusive.

The son of the decedent, who was one of the trustees and also a beneficiary, spent considerable time abroad, although at the time of the decedent's death and for some time prior to her death, he was in this country. The trust instrument also provided for the filling of vacancies by the remaining trustees if any of the trustees should die or resign. In 1920 the settlor resigned as trustee and her daughter, Mary Adelaide Poor, was appointed by the remaining trustees to fill the vacancy. Mrs. Poor held office until November 1921, when she resigned, and the decedent was duly appointed by the remaining trustees to fill the vacancy. The decedent continued to be one of the trustees until the time of her death in January 1931. The other trustees, Arthur H. Sargent and Harry LeBaron Sampson, continued as trustees throughout the whole period from the beginning of the trust until the death of Mrs. Sargent (R. 45).

There was no dispute as to the value of the property transferred by trust (R. 45).

The case was tried without a jury in the United States District Court for Massachusetts. The Dis-

trict Judge rendered judgment for the plaintiffs for the amount of the estate taxes, which they had paid on account of including the corpus of the trust in the gross estate of the decedent. An appeal was taken to the Circuit Court of Appeals for the First Circuit which affirmed the judgment of the District Court.

### SPECIFICATION OF ERRORS TO BE URGED

The United States Circuit Court of Appeals for the First Circuit erred:

1. In failing to determine that the value of the property in question, which was transferred in trust by the decedent, should be included in her gross estate, under the provisions of Section 302 (d) of the Revenue Act of 1926.

2. In refusing to find that the corpus of the trust, less the value of the interest, given to the son, who was also a trustee, should be included in the settlor's gross estate, under the provisions of Section 302 (d) of the Revenue Act of 1926.

3. In affirming the judgment of the District Court.

### REASONS FOR GRANTING THE WRIT

This case presents the questions of the construction and validity of Section 302 (d) of the Revenue Act of 1926 which are also involved in *Helvering* v. *City Bank Farmers Trust Co.*, No. 805, October Term, 1934, and *Helvering* v. *Helmholz*, No. 827, October Term, 1934, in which the Govern-

ment is seeking certiorari to the United States Circuit Court of Appeals for the Second Circuit and the United States Court of Appeals for the District of Columbia, respectively. In addition to the reasons set forth in our petitions in those cases, the decision of the lower court is in conflict with a recent decision of the Circuit Court of Appeals for the Seventh Circuit in the case of *Commissioner* v. *Strauss,* decided March 30, 1935, and not yet officially reported but may be found in Vol. 3, C. C. H., 1935, p. 9751. In the *City Bank Farmers Trust Co.* case the taxpayer has filed a memorandum not opposing certiorari because of the decision of the Seventh Circuit in the *Strauss* case.

For the reasons set forth in our petitions in the *City Bank Farmers Trust Co.* case, *supra,* and in the *Helmholz* case, *supra,* it is respectfully submitted that this petition should be granted.

STANLEY REED,
*Solicitor General.*

APRIL 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935